NO. 46148-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN R. RING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

I. THE STATE ASSUMED THE BURDEN OF PROVING THAT APPELLANT CONCEALED THE STOLEN PROPERTY.

In his opening brief, appellant John Ring asserts the State was required to prove appellant "concealed" a stolen Wave Runner before the jury could properly convict him of first degree possession of stolen property. Brief of Appellant (BOA) at 7-11. In response, the State claims it was not required to prove appellant "concealed" the property because this is not an alternative means of committing the offense but is, instead, a definitional term. Brief of Respondent (BOR) at 6-8. The State is incorrect.

While the State is correct that the term "conceal" is not found in the statute creating the charged offense (RCW 9A.56.150) and is, instead, found in the statute defining "possessing stolen property" (RCW 9A.56.140), the State's claim that it did not have to prove this element is incorrect. BOR at 6-7. The State assumed that burden when the concealment element was specifically included in the to-convict instruction. CP 39.

To-convict jury instructions must contain all the elements of the crime. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become

the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). In a criminal case, if the State adds an unnecessary element in the to-convict instruction, the added element becomes the law of the case and the State assumes the burden of proving the added element. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). A criminal defendant may challenge the sufficiency of the evidence to support such added elements. Hickman, 135 Wn.2d at 102.

When the State includes the definitional alternatives for possessing stolen property (including "concealed") in the to-convict, the law of the case doctrine requires the State to prove each of these as if they were statutory elements. Compare, State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (holding the State was required to prove the defendant concealed property when that means was included in the to-convict); with, State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011) (holding the State was not required to prove concealment when that means was not found in the to-convict instruction). As explained in appellant's opening brief, the State failed to do so. BOA at 9-11. Consequently, reversal is required.

II. THE STATE FAILED TO SUFFICIENTLY PROVE THE MARKET VALUE OF THE STOLEN PROPERTY.

In his opening brief, Ring asserts the State failed to sufficiently prove the market value of the trailer and Wave Runner exceeded $5,000. BOA at 11-15. In response, the State claims the jury could have inferred that the insurance settlement amount reflected the market value of the items. BOR at 8-10. However, the State ignores two key elements necessary for establishing the market value of an item.

Market value is defined as the "price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." State v. Ehrhardt, 167 Wn. App. 934, 944, 276 P.3d 332 (2012) (emphasis added). In this case, the only evidence that the value of the property exceeded $5,000 was the insurance agent's testimony that the company settled the claim for $13,800. Yet, it is factually impossible for the State to prove (or the jury to infer) the market value of any property based solely on the amount for which an insurance company settles a claim. This is because an insurance company is obliged to settle a claim (or enter into the transaction) based on the terms of the insurance contract.

Contrary to the State's argument, the jury could not reasonably infer the market value of the Wave Runner and trailer based solely on the insurance settlement amount because there was an underlining obligation and contract that dictated how property would be valued. Perhaps, if the State had established that the parties had contracted to settle for the fair market value of the property, it might have met its burden. However, no such fact was proven here. Hence, the settlement amount did not establish -- either directly or through inference – a market value where the parties were not obliged to enter into a transaction.

Second, market value is based on an objective standard, not on the value to any particular person or company. State v. Shaw, 120 Wn. App. 847, 850, 86 P.3d 823 (2004). The insurance company's settlement value does not reflect an objective value of the property on the open market; instead, it merely establishes the value dictated by the terms of the insurance contract. Had the State established that the insurance company used an objective standard (i.e. a Kelly Blue Book value) for determining its settlement value, then the jury might have reasonably inferred that the settlement amount was tantamount to an objective market

value. See, BOA at 14. Again, however, no such evidence was presented to the jury here.

In sum, there is nothing in this record from which the jury could reasonably infer market value solely from the insurance company's settlement amount. For the reasons stated above and those stated in appellant's opening brief, this Court should find the State failed to establish the market value of the property exceeded $5,000, and it should reverse appellant's conviction for insufficient evidence.

III. RING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, Ring asserts he was denied effective assistance of counsel when his attorney failed to adequately investigate and locate a key witness ("Stevie") prior to trial. BOA at 18-22. In response, the State claims appellant cannot show prejudice because he "has not shown how this potential witness's testimony would have been relevant or useful at trial." BOR 11. However, the State's view of this evidence is unreasonably narrow.

The State suggests, because Ring was not charged with stealing the Wave Runner and trailer, testimony from the individual whom Ring believed stole the property and dumped it on him was

irrelevant. BOR at 12. However, the State fails to consider that the evidence was undoubtedly relevant to Ring's defense, which was that he did not knowingly possess stolen property.

To be convicted of possession of stolen property, the State must prove the defendant knowingly possessed stolen property. RCW 9A.56.150; RCW 9A.56.140(1). As argued in detail in appellant's opening brief, Stevie's testimony was relevant to establishing Ring did not knowingly possess the stolen property. BOA at 21-22.

In sum, defense counsel was ineffective for not taking objectively reasonable steps to investigate and locate Stevie in time for Ring's trial, and this deficient performance prejudiced Ring's case. See, BOA at 15-22 (arguing this in detail). Hence, this Court should reverse his conviction for possessing stolen property.

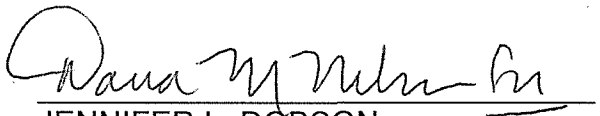
B. CONCLUSION

For the reasons stated above, this Court should reverse Ring's conviction for first degree possession of stolen property.

Dated this 19th day of February, 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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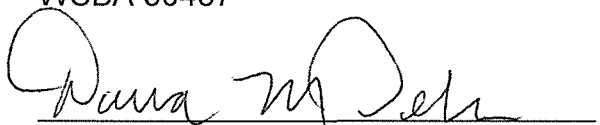

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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	)	
Appellant.	)	

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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